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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

WONG SOON SAN v. MALAYAN UNITED INDUSTRIAL CO. LTD.

[O.C.J. (Raja Azlan Shah J.) July 7, 1966]

[K.L. — Civil Suit No. 1273 of 1964]

Damages — Breach of statutory duty — Common law liability for negligence — Contributory negligence — Machinery (Safety, Health and Welfare) Regulations, 1956, reg. 16(3).

Damages — Eye — Sight of right eye destroyed in course of employment.

The plaintiff a machineman employed by the defendants who were manufacturers of kitchen utensils was engaged in trimming and fettling zinc plates when a zinc trimming flew into his right eye in consequence of which the sight of the eye was destroyed. The machine had a deflector, which if properly adjusted would protect the operator from flying trimmings but no goggles or face shields were provided to the machine operators as required by regulation 16(3) of the Machinery (Safety, Health and Welfare) Regulations, 1956. There was evidence that the deflectors were sometimes adjusted by the machine operators, and they had to be checked by the supervisor.

Held: (1) there was a breach of a statutory duty in this case but as it was probable that in this case the plaintiff had adjusted the guard without the knowledge of the supervisor, he was contributorily negligent to the extent of 30%;

(2) in this case the defendants were also responsible for breach of duty which they owed to the plaintiff under the common law;

(3) taking into consideration the age of the plaintiff and other contingencies, general damages were assessed at $12,000, less 30%, with costs.

Cases referred to:—

(1) *Mitchell* v. *North British Rubber Co. Ltd.* [1945] S.C.(J). 69 at p. 3.

(2) *Lim Thong Eng* v. *Sungei Choh Rubber Co.* [1962] M.L.J. 15 at p. 17.

(3) *Grant* v. *National Coal Board* [1956] 1 All E.R. 682.

(4) *Groves* v. *Wimborne* [1898] 2 Q.B. 402.

(5) *Caswell* v. *Powell Duffryn Collieries Ltd.* [1940] A.C. 152, 172.

(6) *Wakelin* v. *London and South Western Rly.* (1886), 12 App. Cas. 41, 47.

(7) *Flower* v. *Ebb Vale Steel, Iron and Coal Co. Ltd.* [1934] 2 K.B. 132, 143.

(8) *Lewis* v. *Denye* [1940] A.C. 921, 931.

(9) *Gahan* v. *C.E. Heinke & Co. Ltd.* [1958] 1 Q.B. 432.

(10) *Smith* v. *Baker & Sons Ltd.* [1891] A.C. 325 at p. 362.

(11) *Nicholls* v. *Austin (Leyton) Ltd.* [1946] 2 All E.R. 97.

(12) *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 42 at p. 50.

(13) *Re Polemis and Furners Withy & Co. Ltd.* [1921] 3 K.B. 560 at p. 574.

(14) *Morton* v. *William Dixon Ltd.* [1909] S.C. 807 at p. 809.

CIVIL SUIT.

Kirpal Singh Brar for the plaintiff.

H. Cheah for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is a claim for damages in respect of personal injury sustained by the plaintiff in the course of his employment with the defendants. The plaintiff is a machineman employed by the defendants who are manufacturers of kitchen utensils. On 20th February 1963 the plaintiff in the course of his employment was engaged in trimming and fettling zinc plates on the fettling and beading machine when a zinc trimming flew into his right eye in consequence of which the sight of the eye was destroyed.

The working of the machine is quite simple. The zinc plates for trimming are fitted one at a time on to a circular plate on the machine. When each zinc plate is in positon, a lever is thrown to activate a shaft to hold the plate in place. Another lever is then thrown to start the machine. I have visited the factory and a demonstration was given on the very machine concerned in this case, and the whole process to trim each plate took from two to three seconds.

On the far side of the circular plate on the machine is a zinc guard to protect the machine operator against trimmings which shoot off the lips of the zinc plates towards the wall as shown in photographs B. The height and angle of this guard can be adjusted manually. In normal circumstances the trimmings shoot forward towards the wall at a terrific velocity and eventually drop to the floor. The responsibility for adjusting the zinc guard rests on the supervisor and another person and that was not denied by the defendants. The guard is to prevent trimmings from flying backwards. I accept as a fact that if the guard is badly placed or adjusted the trimmings would shoot backwards at a terrific velocity and that, in my view, would be a source of danger to the machine operators who were not provided with goggles or face shields. It is not denied that goggles were not provided to the machine operators.

The plaintiff therefore contends that the injury to his eye was due to a breach of statutory duty under regulation 16(3) of the Machinery (Safety, Health and Welfare) Regulations 1956 — L.N. 208/56 — in that the defendants did not provide the plaintiff with any suitable goggles or a face shield or effective screen to protect his eyes. In the alternative, he contends that the said injury was due to a breach of the common law duty which the defendants owed him.

I will now consider the first claim. In September 1962 a representative from the machinery department inspected the machine in question and certified that it was properly installed. There was no condition specified in respect of the machine. The representative testified that the operator behind the machine is adequately protected from flying trimmings by the guard — "deflector" as he termed it. Accordingly, he said no special devices other than the deflector were required to ensure the safety of the machine operators. I am not bound by the opinion of the representative of the machinery department because the test in such cases is "objective and impersonal". That was clearly laid down in *Mitchell* v. *North British Rubber Co. Ltd.*[1] which was applied by Ong J. in *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.*[2] I am of the view that the defendants were in breach of their statutory duty in not providing goggles or face shields to the machine operators. Mr. Cheah for the defence submitted that in order to succeed the plaintiff must bring his case within the ambit of the regulation. He submitted that the plaintiff must prove two limbs. Firstly, he must be exposed to danger, and secondly, the danger is one that caused injury to his eye. I agree with the proposition but I will put it somewhat differently. Regulation 16(3) reads:

> "Where any person is engaged or assists in any process which may expose him to glare or to the danger of a foreign body injuring the eye suitable goggles or a face shield shall be provided and maintained in good condition for the use of such person".

In my view the regulation is designed for the safety, health and welfare of workmen, and it seems to cover workmen whose work would expose them *inter alia* to "the danger of a foreign body injuring the eye". I must also remember that the Machinery (Safety, Health and Welfare) Regulations are intended not only for the protection of careful, intelligent and obedient workmen but also of those who are stupid, careless, unreasonable or disobedient. In order to attract the provisions of regulation 16(3) it must be established that the plaintiff is one of a class of persons whom the regulation is designed to protect and the damage suffered by the plaintiff is the kind contemplated to be guarded against. Viscount Simonds put the matter succintly in *Grant* v. *National Coal Board*: [3]

> ". . . . where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things, first, that the breach is intended not only to be visited by a penalty but also to be the ground of civil liability to a class of persons of whom the pursuer is one, and secondly, that the injury was one against which the legislation was designed to protect him."

In my judgment, both the tests are satisfied in this case.

It will also be noticed that the regulation is one of absolute liability; it is not qualified, as a statutory obligation sometimes is, by such words as "as soon as possible" or "reasonably practicable". The point is significant because it involves the question whether the plaintiff has to establish negligence on the part of the defendants for it is undoubted law that when a statutory provision contains an absolute obligation a breach of that provision is sufficient to found liability, independent of any proof of negligence. Thus in *Groves* v. *Wimborne* [4] it was held that liability for a breach of the statutory duty to fence dangerous machinery was absolute, and independent of any proof of negligence on the part of the defendant or his servants. In the circumstances, the plaintiff is entitled to succeed under the first claim.

However, that is not the end of the matter. The defendants have pleaded contributory negligence. Even in cases of breach of statutory duty the ordinary plea of contributory negligence is available to the defendants. Lord Wright in *Caswell* v. *Powell Duffryn Collieries Ltd.*[5] said that "in this connection the same rule applies as that stated by Lord Watson in *Wakelin* v. *London and South Western Railway Co.*[6] applicable to an ordinary plea of contributory negligence". *Caswell's* case was concerned with a claim for breach of duty under section 55 of the Coal

Mines Act, 1911. In *Wakelin's* case, Lord Watson stated the law as follows:

"I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour".

In *Caswell's* case Lord Wright (at p. 172) remarked that "the onus is on the defendant to prove that the plaintiff's contributory negligence was a substantial or material co-operating cause". But in cases of this kind where the breach of provision is designed for the safety of workmen, too high a standard of care must not be demanded from a workman. Lawrence J. in *Flower* v. *Ebb Vale Steel, Iron & Coal Co. Ltd.*[7] said:

"I think of course that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence".

Lord Atkin and Lord Wright in *Caswell's* case, *supra,* and Viscount Simonds in *Lewis* v. *Denye* [8] expressed approval of the statement of the law made by Lawrence J. Viscount Simonds in *Lewis'* case (p. 931) stated that "too high a standard of care "must not be demanded from a workman".

I will now consider that aspect of the case in the light of the established principles. To my mind, if the guard was badly adjusted the zinc trimmings would shoot backwards. If the guard had not been improperly adjusted the trimmings would shoot forward. In this case, the plaintiff sustained an injury to his eye by a short trimming flying into it. As a matter of deduction, the cause was therefore that the guard had been improperly adjusted. The question is who had done that? Was it the supervisor or the plaintiff himself or some unknown person? The burden is on the defendants to prove contributory negligence. All things being equal, it is highly improbable for the supervisor or some other workman to adjust the guard so as to afford unnecessary risks to the plaintiff. On the other hand it is probable that the plaintiff had adjusted it without the knowledge of the supervisor, resulting in the injury to his eye, and to that extent he was negligent in the way he did. The problem therefore becomes one of apportionment of the damages in respect of the injury which he suffered. I would therefore apportion his liability at 30 per cent. I have considered the age of the plaintiff and other contingencies and I would assess general damages at $12,000 less 30 per cent., i.e. $8,400, and costs. He had suffered no special damages and his claim under that head fails.

Although the causes of action as pleaded are distinct and separate, there is really only one head of damage for which redress is sought, so that satisfaction of one cause of action ends the whole claim. (*Gahan* v. *C.E. Heinke & Co. Ltd.*).[9] Be that as it may, for the sake of completeness I will consider the common law duty of an employer towards his employee. It is well established that the duty is no more than a duty to take reasonable care not to expose the workman to unnecessary risk. The principle has been put forward by different judges in different words. Thus, Lord Herschell stated the law in *Smith* v. *Baker & Sons* [10] as follows:

"It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk".

Lord Wright in *Nicholls* v. *Austin (Leyton) Ltd.*[11] put the duty at common law in this way:

"That the common law duty exists in proper cases is unquestionable. But it is limited to reasonable exercise of care and skill to guard against danger which as reasonable people, the employers ought to have anticipated".

In his speech in *Paris* v. *Stepney Borough Council* [12] Lord Oaksey said that the duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case.

Having stated the law, I will now consider the facts. I find from the evidence that if properly placed, the zinc guard would afford adequate protection from flying trimmings to a machine operator in the position of the plaintiff, but if improperly placed or adjusted the zinc guard would cause unnecessary risk to him. Evidence has been led that machine operators did on occasion and of their own accord adjust the zinc guards but were checked by the supervisor when detected. From that it would follow that in all probability such adjustments were at times made undetected. That, to my mind, would expose the operators to unnecessary risks. If there is such danger from flying objects off the machine, a real danger which the supervisor had conceded, there is as much reason to protect workmen from such danger as there is. In such circumstances there is reason to anticipate such danger which could result in an accident. If there is the risk of trimmings flying off the machine caused by the improper adjustment of the guard, there must always be a risk of some injury to the eye, and that is something that ought to be anticipated. I think assistance can be gained from the words of Warrington L.J. in *Re Polemis & Furness, Withy & Co. Ltd.*: [13]

"The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then

the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the act".

Even if one could say that no one thought about the possibility or probability of an injury to the eye, it cannot be right if there are these frequent occasions when zinc trimmings fly off the machine due to improper adjustment of the guard that the defendants should do nothing constructive about it except re-adjusting the guard by the supervisor when he detects it. In my view there is a clear case of failure to take a precaution which if taken would result in the workman having less risk to undergo. I take the test which I think ought to be applied from the well known passage in the judgment of Lord Dunedin in *Morton* v. *William Dixon Ltd.*: (14)

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either — to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or — to show that it was a thing which was obviously wanted that it would be folly in anyone to neglect to provide it".

In my judgment the defendants are responsible for damages for breach of the duty which they owe to the plaintiff under the common law. With regard to contributory negligence and quantum of damages, I will adhere to my earlier finding under the first claim.

Order accordingly.

Solicitors: *B. Kaher Singh & Co.; Allen & Gledhill.*

THURARATNAM v. GULWANT SINGH

[F.C. (Barakbah L.P., Ong Hock Thye F.J. and Ismail Khan J.) July 12, 1966]

[K.L. — Federal Court Civil Appeal No. X 15 of 1965]

Moneylenders — Whether amount set out in promissory note was in fact lent — Moneylender's books of account — Moneylenders Ordinance, 1951, s.s 16 & 18.

This was an appeal against the decision of the High Court, which had given judgment in favour of the plaintiff in a moneylender's action claiming repayment with interest of moneys lent. The substantive defence was whether there was compliance with section 16 of the Moneylenders Ordinance and whether the amount in the promissory note was in fact lent. On appeal it was argued that the learned trial judge had not directed his mind to the defence that the purported loan was in fact the renewal of an earlier loan. It was also argued that the claim should have been dismissed as the books of account of the moneylender did not set out the details of the contract or that security in the form of a promissory note was provided.

Held: (1) as the learned trial judge had failed to determine the question whether the amount in the promissory note was in fact lent the appeal must be allowed and a retrial ordered;

(2) the Moneylenders Ordinance does not require all the details of the contract of loan to be set out in the books of account.

Cases referred to:—

(1) *Abirami Ammal* v. *Meyyappa Chettiar* [1959] M.L.J. 149, 151.

(2) *Ang Khye Pang* v. *Chop Ban Aik* [1939] M.L.J. 282.

(3) *Subramaniam* v. *Konar* [1962] M.L.J. 385, 387.

(4) *Nihalchand Narulchand* v. *Macmullan* [1934] 1 K.B. 171, 175.

(5) *Gulwant Singh* v. *Abdul Khalik* [1965] 2 M.L.J. 55.

FEDERAL COURT.

V. K. Palasuntharam (*D. S. Nath* with him) for the appellant.

Thomas Lee for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against a decision of the High Court at Kuala Lumpur given on October 7, 1965 in favour of the plaintiff in a moneylender's action claiming repayment, with interest, of moneys lent.

The statement of claim, in the usual form, alleged that on January 3, 1963 the plaintiff lent to the defendant the sum of $2,400 upon a promissory note payable on demand, at the interest rate of 18 per cent. per annum; that a copy of the promissory note was delivered to the defendant before the money was lent; that no repayments whatever had been made and that notice of demand had been duly served on the defendant before action. The amount claimed was $2,400 in respect of principal and $223.20 being interest thereon from January 3, 1963 to July 9, 1963, the date of issue of the writ.

In his defence, the defendant denied liability on three main grounds: first, that the said promissory note was not for moneys actually lent, but was executed under duress in respect of an antecedent liability of which the balance due was only $800; secondly, that three monthly payments of $50 each towards interest had been made, for which the defendant had not been given credit in this defendant's accounts, with the result that proof of failure to keep proper accounts rendered the claim unenforceable; thirdly, that the claim was unenforceable on other technical grounds for breach of divers provisions of the Moneylenders Ordinance, 1951. The amended defence, by additions and alterations was an amendment in entirety of the original, and runs to over four pages in twelve paragraphs.

The evidence on the record, of both parties, however, was quite brief and covered in all no more than four pages. The plaintiff stated that, since, 1955, he had lent the defendant moneys on three occasions only. The transactions were entered in his account books, which he produced. The first loan, of $1,200, was given on September 12, 1955 and repaid on July 6, 1960. The second,